Supreme Court, U.S.
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No. 06-867

IN THE

Supreme Court of the United States

ELOUISE PEPION COBELL, *et al.*,

Petitioners,

v.

DIRK KEMPTHORNE, SECRETARY,
DEPARTMENT OF THE INTERIOR, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF OF PETITIONERS

DAVID C. SMITH
ADAM H. CHARNES
KILPATRICK STOCKTON LLP
1001 West Fourth Street
Winston-Salem, NC 27101
(336) 607-7300

DENNIS M. GINGOLD
Counsel of Record
607 14th Street, N.W.
9th Floor
Washington, DC 20005
(202) 824-1448

Of counsel:
JOHN ECHOHAWK
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, CO 80302

ELLIOTT H. LEVITAS
KILPATRICK STOCKTON LLP
607 14th Street, N.W.
9th Floor
Washington, DC 20005
(202) 508-5800

Counsel for Petitioners

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REPLY BRIEF OF PETITIONERS

This is a trust case involving the Individual Indian Trust ("IIM Trust") that was established by the United States in 1887 when it forcibly took control of fifty-four million acres of Indian lands, placed the lands in trust, and proceeded to manage the *corpus* on behalf of individual Indian beneficiaries who rely upon the income generated therefrom for basic necessities. Today, the IIM Trust consists of eleven million acres of land, natural resources, investment securities, cash, and other assets valued in the hundreds of billions of dollars.[1] This is an action in equity to enforce trust duties the United States government owes to Petitioners, a class consisting of all past and present IIM Trust beneficiaries. Respondents' experts admit that up to forty billion dollars is missing from the trust.[2]

Respondents' management of the IIM Trust is governed by statute and trust law principles in accordance with this Court's rulings in *United States v. Mitchell* (*Mitchell II*), 463 U.S. 206 (1983) and *United States v. White Mountain Apache Tribe* (*White Mountain Apache*), 537 U.S. 465 (2003). Pursuant thereto, both the District Court, *Cobell v. Babbitt* (*Cobell V*), 91 F.Supp. 2d 1 (D.D.C. 1999) and the Court of Appeals, *Cobell v. Norton* (*Cobell VI*), 240 F.3d 1081 (D.C. Cir. 2001), have declared that Respondents have an unconditional fiduciary duty to account for all trust funds since the inception of the IIM Trust. However, no such accounting has been rendered.

Fundamental to the declared duty to account is the fiduciary duty to protect trust records. Both the Court of Appeals and District Court, in prior decisions, concluded that inadequately secured trust records irreparably harm Petitioners

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[1] Contrary to Respondents' characterization, (Resp'ts' Br. at 12), the IIM Trust is not a "government program."

[2] *See* SRA International Risk Assessment at 5-1 (Jan. 18, 2002); *see* 05-5388 C.A. App. 10126.

and render any accounting impossible. Further, the District Court found, and Respondents do not contest, that the integrity of Individual Indian Trust Data ("IITD") housed in, and accessed through, Respondents' information technology ("IT") systems, is at "imminent risk of compromise." Accordingly, the District Court entered a preliminary injunction to protect crucial trust records from further loss, corruption, and destruction. In reversing that decision, the Court below disregarded decisions of this Court in failing to defer to the discretion of the District Court, and in invoking the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 *et seq.*, to limit the broad equitable authority conferred on the District Court by the United States Constitution.

I. CONSISTENT WITH *PURCELL V. GONZALEZ*, 127 S. CT. 5 (2006) (*PER CURIAM*), THE COURT OF APPEALS' JUDGMENT SHOULD BE VACATED.

In *Purcell,* decided after the decision below, this Court summarily vacated a decision of the Ninth Circuit reversing a district court's decision not to grant injunctive relief where there was "no indication" it had deferred to the discretion of the lower court. 127 S. Ct. at 7. Respondents acknowledge that the decision to grant injunctive relief is within the discretion of the District Court and that it is incumbent on the Court below to defer to the District Court's determination, reversing only upon finding an abuse of that Court's discretion. Resp'ts' Br. at 13. *See generally Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal,* 546 U.S. 418, ---, 126 S. Ct. 1211, 1219 (2006). Importantly, as Respondents concede, the Court of Appeals' opinion is devoid of any indication that it accorded

deference to the District Court's extensive findings and conclusions.[3] Resp'ts' Br. at 14.

Despite this concession, however, Respondents seek to evade the application of *Purcell* by suggesting that a finding of abuse of discretion is implicitly "infuse[d] [in] the court of appeals' analysis." Resp'ts' Br. at 14. Respondents cite no authority for their theory and such an argument is in direct conflict with this Court's holdings. *See Dennison Mfg. Co. v. Panduit Corp.*, 475 U.S. 809, 811 (1986) (*per curiam*) (vacating judgment of the Federal Circuit where it failed to "explicitly apply the clearly-erroneous standard" of Fed. R. Civ. P. 52(a) to any of the district court's findings).

Further, although Respondents are unable to argue clear error with respect to the findings of the District Court,[4] the Court below summarily rejected the District Court's findings. By way of example, the District Court found: "that the confidentiality, integrity and availability of IITD on Interior's IT systems are presently at substantial and imminent risk of compromise;" "that failure to take immediate action . . . risks the complete destruction of these Indians' trust interests;" that the Petitioners' accounting remedy is dependent on secure IT systems; and, that the pervasive vulnerabilities in those systems

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[3] While Respondents mention that the Court of Appeals referred to the District Court's findings as an abuse of discretion in another opinion, (Resp'ts' Br. at 14-15), they cite no authority to support their view that dispositive errors in one judgment may be cured by an assumption made in another opinion by a different judge faced with different facts and legal issues.

[4] Respondents conceded during oral argument below that they did not contest the District Court's factual findings. *See* Tr. Ct. of App. at 15:17-20 (Apr. 11, 2006) (The Court: "In fact, I couldn't find the words clearly erroneous in your brief." Mr. Stern: "No, we are - I mean we're not arguing that."). Instead, they argue that the "court of appeals correctly held that any benefit to petitioners. . . was too slight and too speculative" to justify the injunction. Resp'ts' Br. at 9. But, that is not a holding of the Court below.

impact the Petitioners' receipt of trust income upon which they "depend . . . for the basic staples of life." Pet. App. at 271a, 278a, 274a. Inexplicably, the Court below disregarded these findings, being "unconvinced the class members demonstrated that they would necessarily suffer harm . . . ." *Id.* at 30a. Likewise, the District Court was presented no evidence that Internet disconnection would cause more than temporary inconvenience.[5] Respondents' experts testified *only* that previous Internet disconnection had been "difficult." The District Court noted that difficulty had been overcome and found that Interior had been able to "work around the absence of Internet connectivity . . ." and could do so again. *Id.* at 277a-278a. However, in disregard of the record evidence, the Court below set aside the District Court's findings, concluding "[t]he district court seemingly disregarded the harm an injunction would cause to Interior . . . ." *Id.* at 31a.

The Court of Appeals must defer to the District Court's factual findings, and may only conclude that the lower court abused its discretion where such findings are clearly erroneous. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 401 (1990). It may not assume the role of trier of fact and substitute its judgment for that of the District Court. *Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985). Yet that is precisely what the Court of Appeals did here.

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[5] Respondents are wrong when they say they introduced evidence that loss of Internet connectivity would cause substantial harm. (Resp'ts' Br. at 10 n.3.) The first two citations prove the opposite proposition: that disconnection from the Internet would cause no such harm. *See* 05-5388 C.A. App. 3818, Trial Tr. at 38-39 (estimated rents, royalties, and bonuses were paid during disconnection and later reconciled); *id.* at 3483, Trial Tr. at 11:14-25 ("difficult to do business. . . [had] to find a [ ] work around."). The last two citations are inapposite; they relate to a complete "shut down" of computers, not mere Internet disconnection as the District Court ordered. *See id.* at 3742, Trial Tr. at 73:1-10; and *id.* at 3978, Trial Tr. at 4:12-25.

II. THE PANEL ERRED IN REQUIRING CERTAINTY OF HARM

Respondents concede that Petitioners needed to establish only a "likelihood of substantial and immediate irreparable injury" to be entitled to injunctive relief. *O'Shea v. Littleton*, 414 U.S. 488, 502 (1974). They further concede, (Resp'ts' Br. at 15), that the Court below, contrary to this Court's holdings, stated Petitioners had to show they would "necessarily suffer harm." Pet. App. at 30a. This is a material misapplication of the preliminary injunction standard and not, as Respondents argue, mere "imprecision" by the Court below. Resp'ts' Br. at 15. Importantly, it also ignores the fact that the District Court specifically found Petitioners would "necessarily" suffer such harm, characterizing the harm as "imminent."

III. THE PANEL'S DECISION DISREGARDS, AND IS INCONSISTENT WITH, *MITCHELL II* AND *WHITE MOUNTAIN APACHE*

A. Respondents Owe Petitioners Trust Duties.

Absent from Respondents' opposition is any recognition of their trust duties. Their efforts to flee from their trust responsibilities cannot be reconciled with *Mitchell II* and *White Mountain Apache*.

In *Mitchell II*, this Court held that the "pervasive control" exercised by Respondents over individual Indian timber and income from its sale established a "fiduciary relationship" and required the application of trust law principles. *Mitchell II*, 463 U.S. at 224, 235. This Court explained that where, as here, the government exercises its specific statutory authority – *e.g.*, regarding the sale of individual Indian timber and the investment of income from such sales – such control is conclusive evidence that the IIM Trust is a trust in equity and that "[a]ll of the necessary elements of a common-law trust are

present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds)." *Id.* at 225. Consequently, "'where the Federal Government takes on or has control or supervision over . . . monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (*unless Congress has provided otherwise*) . . . .'" *Id.* (emphasis added) (quoting *Navajo Tribe of Indians v. United States*, 624 F.2d 981, 987 (Cl. Ct. 1980). In *White Mountain Apache*, this Court expanded *Mitchell II*, holding that even in the absence of specific statutory authority, the exercise of control over trust assets establishes a trust relationship, thereby obligating Respondents to ensure that trust property does not "fall into ruin." *White Mountain Apache*, 537 U.S. at 475.

As in *Mitchell II* and *White Mountain Apache*, Respondents exercise complete control over IIM Trust assets. Congress has taken no action to limit Respondents' trust duties; nor has it limited the equitable authority of the District Court to enforce these trust duties. Accordingly, expressly relying on this Court's precedents, the Court of Appeals in *Cobell VI* reaffirmed Respondents' trust duties, noting "it is clear that the federal government has been under an obligation to discharge the fiduciary duties owed to IIM trust beneficiaries for decades." *Cobell VI*, 240 F.3d at 1095.

As trustee-delegates, Respondents were ordered over seven years ago to account for all IIM Trust funds. However, as the Court of Appeals and District Court repeatedly have confirmed, compliance with that order is impossible without adequate security to ensure the integrity of trust records. *See e.g., id.* at 1109 ("Given the history of destruction of documents and loss of information necessary to conduct an historical accounting, the failure of the government to act could place anything approaching an adequate accounting beyond plaintiffs' reach."); *Cobell v. Norton (Cobell VII)*, 226 F. Supp. 2d 1, 129

(D.D.C. 2002), *rev'd on other grouds, Cobell v. Norton* (*Cobell VIII*), 334 F.3d 1128 (D.C. Cir. 2003) ("there is simply no possible way for the Secretary to provide . . . an accurate accounting if the data upon which []he relies to do so is subject to unauthorized manipulation."). As the District Court found, which findings Respondents do not contest, the integrity of IITD on Respondents' IT systems today is at "imminent risk of compromise," and without immediate action, Petitioners face the risk of "complete destruction" of trust property. Pet. App. at 271a, 278a.

B. District Court Authority to Stop Respondents' Breaches of Trust is Not Limited by the APA.

Central to this petition is the District Court's power to fashion injunctive relief to protect IIM Trust records and other assets from further corruption and loss. That authority is conferred in the Constitution[6] and memorialized by this Court in *Mitchell II*. There, the authority to grant injunctive relief to stop government breaches of trust was viewed as beyond dispute, the United States conceding that remedy. *Mitchell II*, 463 U.S. at 227; *see also White Mountain Apache*, 537 U.S. at 478 (where the government argued that "prospective injunctive relief" was the "sole relief" for its breaches of trust).[7] The power to halt breaches of trust through injunctive relief, as

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[6] *See* 1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE, § 291, at 651-52 (5th ed. 1941) ("The Constitution of the United States recognizes equity as a part of the national jurisprudence inherited from England at the time of the Revolution, and the equitable jurisprudence as a part of the judicial powers conferred upon the national tribunals."); *id.* § 294, at 676 ("[I]t is identical or equivalent in extent with that possessed by the English High Court of Chancery at the time of the Revolution.") (footnote omitted).

[7] Here, injunctive relief is crucial as the inability to detect unlawful alteration of electronic trust records makes an historical accounting impossible and ensures that misappropriation can never be determined, rendering a "damages" remedy for harm inflicted illusory.

expressed in *Mitchell II,* is supported by sound trust principles. *See e.g.*, 4 POMEROY, §1340, at 939; § 1348, at 951. Additionally, this Court's teaching in that regard previously was recognized and applied by the Court of Appeals in this very litigation. *See Cobell v. Norton* (*Cobell XII*), 391 F.3d 251, 256 (D.C. Cir. 2004) (holding that the District Court may enter "a preliminary injunction regarding IT security"). Thus, the District Court is empowered to enjoin Respondents' continuing breaches of trust.

In disregard of rulings made by this Court a generation ago, Respondents assert, (Resp'ts' Br. at 16-17), and the Court below held, (Pet. App. at 34a), that the authority of the District Court to enjoin Respondents' breaches of trust is limited by discretion that must be accorded Respondents under the APA. However, the District Court did not dictate *how* Respondents must preserve IIM Trust records; only that they be preserved.

The APA does not shield Respondents from the equitable power of a district court to enjoin their breaches of trust. One can search *Mitchell II* and *White Mountain Apache* in vain for any suggestion that the APA shields these trustee-delegates from the District Court's equitable authority. Congress has *not* limited the application of trust law principles to the government as trustee; nor has it limited the equitable authority of the district court to enforce trust duties the United States owes to Petitioners. Trust law governs Respondents' management of the IIM Trust to the same extent trust law governs private trustees.[8]

Indeed, in a prior decision in this case, the Court of Appeals expressly rejected the position now urged by

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[8] *See e.g. Mitchell II*, 463 U.S. at 226 (applying common law trust principles to determine the government's liability for a breach of fiduciary duty). Further, here, injunctive relief is proper because in equity there is no wrong without a remedy. *See* 2 POMEROY, § 423, at 185 ("This principle . . . is the source of the entire equitable jurisdiction, exclusive, concurrent, and auxiliary.")

Respondents and decided by the Court below. In *Cobell XII*, Respondents argued that the District Court, in entering an injunction almost identical to that here in issue, had "exceeded its authority under the APA and violated separation of powers principles." 391 F.3d at 256. The Court of Appeals dismissed that argument as "unpersuasive," *id.* at 257, explicitly upholding the District Court's "jurisdiction" and "authority." *Id.* at 253-54, 256. In so ruling, the Court of Appeals explained that the APA "did not limit the district court's authority to exercise its discretion as a court of equity in fashioning a remedy to right a century-old wrong . . . ." *Id.* at 257. Accordingly, it ruled that the District Court "retains substantial latitude, much more so than in the typical agency case, to fashion an equitable remedy because the underlying lawsuit is both an Indian case and a trust case in which the trustees have egregiously breached their fiduciary duties." *Id.* at 257-58. Against that background, the Court of Appeals held "the narrower judicial powers appropriate under the APA do not apply," *id.* at 257, and that the District Court's IT Security injunction did *not* violate the APA or separation-of-powers principles under *Lujan v. National Wildlife Federation*, 497 U.S. 871, 891 (1990). *Cobell XII*, 391 F.3d at 258.

Rather than conflicting with the APA, the authority of the District Court to preserve IITD and other trust assets through injunctive relief is reconfirmed by it. The APA reserves to an administrative agency only decisions that are discretionary, not actions that are legally required. *See Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 62-65 (2004). The duty to preserve and protect trust assets is not a discretionary one. Restatement (Second) of Trusts § 187 cmt. a (1959) (noting the duty of a trustee is not discretionary where "required . . . by principles of law applicable to the duties of trustees"). Accordingly, the unprecedented restraint on the District Court's

authority to enjoin Respondents' continuing breaches of trust duties should not be permitted to stand.

C. The Injunction To Preserve IIM Trust Records Is Consistent With Trust Law.

Relying on this Court's opinion in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), Respondents argue that, under trust law, "the government in administering statutes governing trust assets retains significant discretion to decide how best to accomplish its assigned tasks," which discretion is "'free of direct judicial control.'" Resp'ts' Br. at 16-17 (citation omitted). They are wrong. As explained in *Firestone*, the power of a trustee is subject "'to control by the court . . . to prevent an abuse by the trustee of his discretion.'" 489 U.S. at 111 (quoting Restatement (Second) of Trusts § 187 (1959)). Once again, it is an abuse of discretion for trustees, including Respondents, to violate their trust duties by allowing trust records and other assets to fall into ruin and waste.

Finally, Respondents argue that to allow this injunction would open "'nearly any system administrator who maintains data for private trusts . . . [to the] danger of facing similar claims for relief,'" as there is never "'perfect security.'" Resp'ts' Br. at 17 (quoting Pet. App. 31a). Respondents miss the mark. The issue is not "perfect security." Rather, the issue is whether the District Court can stop Respondents from violating their trust duties by failing to provide *adequate* security. Today, Petitioners continue to be at "imminent" risk of continuing irreparable harm and catastrophic loss. That must stop.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment below vacated, and the case remanded for reconsideration in light of *Purcell*. Alternatively, the petition should be granted.

Respectfully submitted,

DAVID C. SMITH
ADAM H. CHARNES
KILPATRICK STOCKTON LLP
1001 West Fourth Street
Winston-Salem, NC 27101
(336) 607-7300

DENNIS M. GINGOLD
Counsel of Record
607 14th Street, N.W.
9th Floor
Washington, DC 20005
(202) 824-1448

Of counsel:
JOHN ECHOHAWK
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, CO 80302

ELLIOTT LEVITAS
KILPATRICK STOCKTON LLP
607 14th Street, N.W.
Suite 900
Washington, DC 20005
(202) 508-5800

Counsel for Petitioners